

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Narin Prasert Vong,

Petitioner/Defendant,

v.

ORDER

Criminal No. 97-147(1)

United States of America,

Respondent/Plaintiff.

This matter is before the Court upon the *pro se* motion of Petitioner Narin Vong for relief from judgment pursuant to a writ of audita querela. For the reasons discussed below, the motion is denied.

Petitioner was found guilty by a jury of four counts: one count of conspiracy to defraud the United States; two counts of aiding and abetting a robbery affecting interstate commerce; and one count of aiding and abetting the use of a firearm in a crime of violence. Petitioner was sentenced to 147 months: 60 months on Count One, 87 months on Counts Eight and Ten - to be served concurrently; and 60 months on Count nine to be served consecutively. The Petitioner's convictions were affirmed on appeal. United States v. Vong, 171 F.3d 648 (8th Cir. 1999).

Petitioner moved for a new trial, and this motion was denied by Order dated October 30, 2001. Petitioner also filed a habeas petition pursuant to 28

U.S.C. § 2255. By Order dated November 14, 2001, the petition was denied. The Eighth Circuit denied Petitioner's request for a certificate of appealability and his appeal of the Order denying his habeas petition was dismissed by Order dated April 5, 2002.

Subsequently, Petitioner sought permission from the Eighth Circuit to file a successive habeas petition. This request was also denied by Order dated May 10, 2006.

Petitioner has now moved this Court for relief from his sentence under a common law writ of audita querela. Such a writ allows one to attack a judgment that was correct when rendered, but later became incorrect because of circumstances that arose after the judgment. Carrington v. United States, 470 F.3d 920, 923 n. 1 (9th Cir. 2006). If the relief sought, however, could have been obtained through a § 2255 petition, this common law writ cannot be used. Id.; Corral v. United States, 436 F. Supp.2d 1045, 1046 (D.N.D. 2006) (same). "This is true even when a particular defendant's petition under Section 2255 would be dismissed as successive." Id.

In the opening paragraph of his motion, Petitioner asserts that he is seeking relief because his sentence is now unconstitutional pursuant to United States v. Booker, 543 U.S. 220 (2005). However, as evident in the body of his brief, Petitioner simply argues that the Court should not have applied the use of minor

enhancement, and should have departed downward because of an INS detainer.

As both of these arguments could have been raised in a § 2255 petition, the current motion must be denied.

IT IS HEREBY ORDERED that the Motion for Relief from Judgment Under a Common Law Writ of Audita Querela [Doc. No. 336] is DENIED.

Date: February 27, 2007

s / Michael J. Davis
Michael J. Davis
United States District Court